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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

COLETTE ALTAFFER, WILLIAM ALTAFFER, DABNEY ALTAFFER, and WENDELL NIEMANN, Plaintiffs/Appellants, v. DEAN W. GRAVES and VIRGINIA W. GRAVES, husband and wife, Defendants/Appellees.	2 CA-CV 2007-0163 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20070287

Honorable Charles V. Harrington, Judge

AFFIRMED

Gabroy, Rollman & Bossé
By Richard M. Rollman and Richard A. Brown
Tucson
Attorneys for Plaintiffs/Appellants

Hatcher & Oden, P.L.C.
By Lane D. Oden Tucson

and

Butler & Associates, P.L.C.
By Michael J. Butler Tucson
Attorneys for Defendants/Appellees

V Á S Q U E Z, Judge.

¶1 Appellant Collette Altaffer and other property owners in the Catalina Vista Subdivision (hereinafter "Altaffer") filed this declaratory relief action against appellees Dean and Virginia Graves ("Graves"), seeking to enforce a restrictive covenant that limits residences in the subdivision to single story. On appeal, Altaffer challenges the trial court's grant of summary judgment in favor of Graves, arguing the court erred by finding a guest house built by Graves did not violate the subdivision's Covenants, Conditions and Restrictions. She also challenges the court's award of attorney fees to Graves. For the reasons stated below, we affirm.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered. *Acosta v. Phoenix Indem. Ins. Co.*, 214 Ariz. 380, ¶ 2, 153 P.3d 401, 402 (App. 2007). The Catalina Vista Subdivision in Tucson was originally developed in 1940, and all of the lot owners are subject to the subdivision's Declaration of Restrictions, Covenants, Conditions & Reservations ("CC&Rs") recorded in 1941. The

CC&Rs include two provisions that are at the center of the parties' dispute: § A(1), which limits homes to "one-story," and § A(11), which requires all buildings to conform with the City of Tucson Building Code in effect at the time of their construction.

¶3 In May 2005, Graves purchased a home in Catalina Vista. In December, Dean Graves contacted Collette Altaffer in her capacity as President of the Catalina Vista Neighborhood Association to inform her he intended to build a guest house on his property. Altaffer informed him there was no design review committee for the neighborhood and referred him to the City of Tucson's zoning requirements and the CC&Rs.

¶4 In the course of subsequent communications between Altaffer and Graves, a disagreement emerged over whether the proposed nineteen-foot high guest house, which included a loft on a level higher than the main floor, constituted a "one-story" structure for purposes of § A(1) of the CC&Rs. Notwithstanding this disagreement, Graves submitted plans for the guest house to the City of Tucson in March 2006 and was issued a building permit the following October. Construction began shortly thereafter. In January 2007, Altaffer filed this action, seeking a declaratory judgment that the loft of the guest house constituted a second story in violation of the CC&Rs and should be removed.

¶5 Graves moved for summary judgment contending that, because the loft area of the guest house was less than one-third of the area of the floor below, the loft did not

constitute an additional "story" under the current City of Tucson Building Code.[1] Thus, Graves argued, § A(11) of the CC&Rs incorporated the code's definitions of the term "story" into the CC&Rs. In response, Altaffer argued that the interpretation of "story" should be based on "a common sense understanding of the term," along with "contemporaneous standards and advertising employed in connection with the development of the neighborhood."

¶6 The trial court granted Graves's motion, finding that "[b]ecause the Graves' guesthouse qualifies as a single story under building codes as they currently exist, as instructed by provision A(11) . . . the guesthouse is not in violation of the one-story restriction in A(1)." The court awarded Graves attorney fees pursuant to A.R.S. § 12-341.01(A). This appeal followed; we have jurisdiction under A.R.S. § 12-2101.

[1]The specific provisions of the City of Tucson Building Code are found in the International Residential Code ("IRC") and the International Building Code ("IBC"), which are incorporated by reference into the city code. *See* Tucson City Code, part II, ch. 6, art. III, § 6-34. The IRC defines a "Mezzanine, Loft" as "An intermediate level or levels between the floor and ceiling of any story with an aggregate floor area of not more than one-third of the area of the room or space in which the level or levels are located." International Residential Code, § R202. And the IBC defers to the IRC with respect to "[d]etached one- and two-family dwellings . . . not more than three stories above grade plane in height with a separate means of egress and their accessory structures." International Building Code, § 101.2.

Discussion

I. Interpretation of CC&Rs

¶7 Altaffer first argues the trial court erred in finding the guest house was not in violation of the CC&Rs. We review a trial court's grant of summary judgment to determine "'whether a genuine issue of material fact exists and whether the trial court correctly applied the law.'" *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, ¶ 37, 87 P.3d 81, 88 (App. 2004), *quoting PNL Asset Mgmt. Co. v. Brendgen & Taylor P'ship*, 193 Ariz. 126, ¶ 10, 970 P.2d 958, 961 (App. 1998). The interpretation of restrictive covenants in a deed is generally a matter of law that we review de novo. *Id.* ¶ 11. And we interpret such covenants "to give effect to the intention of the parties as determined from the language of the document in its entirety and the purpose for which the covenants were created." *Powell v. Washburn*, 211 Ariz. 553, ¶ 1, 125 P.3d 373, 374 (2006).

¶8 Altaffer asserts that, unlike the trial court, we should not look to § A(11) in order to interpret CC&R § A(1). Instead, she proposes an alternative interpretation of § A(1), which she claims is a better reflection of the intent of the drafters of the CC&Rs. Thus, she contends the conflicting interpretations raise a genuine issue of material fact and summary judgment was inappropriate. Although these arguments are interconnected, we consider each in turn. And, because both parties rely on *Powell v. Washburn*, which has many facts in common with the present case as well as some important differences, we begin our discussion with an overview of that case.

¶9 In *Powell*, our supreme court considered whether CC&Rs that listed and restricted the size and other characteristics of three types of residences—mobile homes, constructed homes, and hangar-homes—in a subdivision devoted to an "Airpark" should be interpreted as prohibiting recreational vehicles. *Id.* ¶ 3. At the time the CC&Rs were drafted, local zoning ordinances incorporated into the CC&Rs did not permit recreational vehicles ("RVs") as residences. *Id.* ¶¶ 2-3. However, the ordinances were subsequently amended to allow RVs, and a group of residents filed suit to enjoin the use of RVs as residences within the Airpark. *Id.* ¶¶ 3-4. The trial court granted the residents' motion for summary judgment and our supreme court affirmed, concluding that "although the CC & Rs neither expressly prohibit nor permit RVs as residences . . . the intent and purpose of the CC & Rs [was] to preclude the use of RVs and other non-listed 'residences' in the Airpark." *Id.* ¶¶ 4, 18, 25.

¶10 Explicitly adopting the approach of the Restatement (Third) of Property: Servitudes, the court held that a restrictive covenant "'should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.'" *Id.* ¶¶ 13, 14, *quoting* Restatement § 4.1(1) (2000). And, looking to the text of the CC&Rs, the court noted that the restrictions required all three types of permitted residences to have a hangar and found it "unlikely that the parties to the CC & Rs, having carefully specified how certain types of expressly permitted residences must be configured,

would allow all other types of residences with no requirements whatsoever." *Id.* ¶¶ 22-23. Thus, in light of a provision in the CC&Rs stating that the CC&Rs would apply if more restrictive than applicable law, the court found the zoning ordinances did not control on this issue. *Id.* ¶ 25.

A. Applicability of Section A(11)

¶11 Altaffer contends that § A(11)—and thus, the definition of "story" incorporated into the current Tucson building code—is not "meaningful" in interpreting § A(1) because there is no "linkage between th[ose] provisions." But her interpretation—limiting one story to a height of fifteen feet—is not supported by the plain language of § A(11), which states that all buildings "shall be erected in accordance with the building code of the City of Tucson, Arizona, in effect at the time such building is erected." And in interpreting restrictive covenants, we must look to "the language of the document in its entirety." *Id.* ¶ 1.

¶12 *Powell* found language similar to § A(11) to "incorporate, by reference, the La Paz County zoning ordinances," and the court considered the relevant provision of the ordinances in interpreting the CC&Rs, despite the absence of an explicit link between the "incorporation" provision and the specific provisions at issue.[2] *Id.* ¶¶ 2, 25. Ultimately

[2]In that case, the CC&Rs stated that "the use and improvement of the Property shall be . . . in accordance with applicable governmental law, including without limitation, the zoning ordinances of the County of La Paz . . . as they may be amended or expanded from time to time." *Powell*, 211 Ariz. at 560, 125 P.3d at 380 (appendix to court's opinion).

Powell rejected the language of the applicable zoning ordinance, which would have permitted recreational vehicles in a manufactured home subdivision. *Id.* ¶ 28. However, it did so because, unlike the CC&Rs in this case, those in *Powell* expressly provided that in the event the CC&Rs were more restrictive than "applicable law," the CC&Rs would govern. *Id.* ¶ 25. Thus, in the absence of a definition of "story" within the document itself, we find, like the trial court did, that this term should be defined in accordance with the current City of Tucson Building Code.

B. Purpose of the CC&Rs

¶13 But Altaffer further argues, relying on *Powell*, that in interpreting the CC&Rs we must also look to "the purpose for which the covenants were created." *Id.* ¶ 1. And, she asserts the purpose of § A(1) was "to preserve the neighborhood residents' views of the Catalina Mountains by restricting the height of houses to 'one-story.'" While we do not disagree with either of these contentions, the question in this case is not whether the one-story restriction was intended to limit the height of buildings in Catalina Vista, but rather how such a restriction should be applied and what the limit should be. And the drafters of the CC&Rs chose to give effect to this height restriction by limiting buildings to "one-story," not by limiting their height in feet. We are therefore not persuaded that defining the term "story" in accordance with the current building code, as incorporated into the CC&Rs, is

in any way contrary to the CC&Rs' intent and purpose.[3] Moreover, unlike the unsuccessful defendants in *Powell*, Graves does not argue the CC&Rs should defer to a clearly less restrictive provision in the applicable zoning ordinances, which here would be the height limit of twenty-five feet provided for in lots over 10,000 square feet zoned R-1 by the City of Tucson.[4] *See id.* ¶ 25.

C. Summary judgment

¶14 For the reasons noted above, we disagree with Altaffer's characterization of the definition of "story" contained in the building codes as merely "an alternative interpretation." We also disagree with her contention that summary judgment was inappropriate because "there was at minimum a material factual dispute regarding what the drafters intended." Whether "contract language is 'reasonably susceptible' to the interpretation asserted by its proponent" is a question of law for the court. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 154, 854 P.2d 1134, 1140 (1993); *see also In re Estate of Lamparella*, 210 Ariz. 246, ¶ 21, 109 P.3d 959, 963 (App. 2005). Altaffer points to her architectural expert's opinion that the CC&Rs' "restriction to one-story does not authorize a mezzanine level which would effectively add a second story in height to the

[3]Even if we were to accept the various dictionary definitions of "story" offered by Altaffer rather than the definition incorporated into the Tucson code, the only nonconforming element of Graves's guest house would be the loft itself. And because removing the loft would not reduce the height of the guest house, our adoption of Altaffer's definitions would do nothing to further what Altaffer argues was the intent of the one-story limit.

[4]*See* City of Tucson Land Use Code §§ 2.3.4, 3.2.3.1(B).

building." But such conclusory statements, unsupported by any authority, are not sufficient to defeat summary judgment. *See Pace v. Sagebrush Sales Co.*, 114 Ariz. 271, 275, 560 P.2d 789, 793 (1977); Ariz. R. Civ. P. 56(e). There is simply no evidence that the drafters intended a loft to constitute an additional story under the CC&Rs, or for that matter that the fifteen-foot height restriction suggested by Altaffer's expert, rather than nineteen feet—the height of Graves's guest house—was what the drafters intended for the "one story" buildings in the subdivision. And, as Altaffer conceded at oral argument, there is also no evidence in the record to suggest that Graves's guest house in fact obstructed any of his neighbors' views. We believe the CC&Rs themselves incorporate a definition of "story" from the City of Tucson Building Code that does not conflict with their intent and purpose. Thus, we do not find them "reasonably susceptible" to more than one interpretation.[5]

¶15 We similarly disagree with Altaffer's assertion that whether "'one-story' means one-story, not one-story and a mezzanine or loft on top, or one and one-half stories, or split

[5]Furthermore, it is questionable whether the evidence presented by Altaffer is sufficient to create a dispute as to any material fact. *See Orme Sch. v. Reeves*, 166 Ariz. 301, 311, 802 P.2d 1000, 1010 (1990) (mere "scintilla of evidence, or some dispute over irrelevant or immaterial facts" insufficient to send claim to jury). Although Altaffer relies on the 1930 Tucson building code for her contention that "one-story" actually means "fifteen feet," this claim is based on her "presumption" that this code "employed a height restriction based on the height of each story as 10 feet, plus an additional five feet for foundation or attic space." But such an interpretation is based on provisions in that code concerning structures of two stories and higher. Contrary to Altaffer's assertion, there is no evidence in the record that the term "one-story" was or has ever been defined in the Tucson building code—or indeed anywhere else—as setting a "clear" height limit in feet. Nor do the 1940s advertisements quoted by Altaffer, promising "No two-story houses to obstruct the mountain view," assist in establishing such a limit.

level or anything else" is an issue of material fact. Rather, it is a question of interpretation, which is "a matter of law and not a question of fact." *Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993). Thus, contrary to Altaffer's contention, we need not "permit a jury to determine what the [CC&Rs] . . . intended," because we can ascertain that intent as a matter of law from the language of the CC&Rs. *See Powell*, 211 Ariz. 553, ¶ 18, 125 P.3d at 378.

D. Conclusion

¶16 We have no basis on which to impose a height limit for Graves's guest house other than the one-story limit set by the CC&Rs. And we are not persuaded that the definition of the term "story" in the applicable Tucson building codes, as incorporated into the CC&Rs, is at odds with the restriction's intent. We therefore use that definition in interpreting the restriction, and conclude that, because the loft of Graves's guest house is less than a third of the area of the space in which it is located, it does not constitute an additional story.[6] The trial court did not err in granting summary judgment in favor of Graves.

II. Attorney Fees

[6]Because we affirm the trial court on this ground, we do not consider Graves's alternative argument that Altaffer waived her right to enforce the one-story provision by acquiescing in violations elsewhere in the neighborhood.

¶17 Altaffer argues the trial court erred in awarding Graves attorney fees pursuant to A.R.S. § 12-341.01(A).[7] We review such an award of fees for an abuse of discretion and will not disturb the trial court's judgment if there is "'any reasonable basis for the exercise of such discretion.'" *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570-71, 694 P.2d 1181, 1184-85 (1985), *quoting Jones v. Queen Ins. Co.*, 76 Ariz. 212, 214, 262 P.2d 250, 251 (1953). "CC & Rs constitute a contract between the subdivision's property owners as a whole and individual lot owners." *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, ¶ 5, 2 P.3d 1276, 1279 (App. 2000). Thus, an action to enforce a deed restriction arises out of contract for the purpose of a fee award under § 12-341.01. *Pinetop Lakes Ass'n v. Hatch*, 135 Ariz. 196, 198, 659 P.2d 1341, 1343 (App. 1983).

¶18 In *Associated Indem. Corp.*, our supreme court listed six factors it considered "useful to assist the trial judge in determining whether attorney's fees should be granted

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[7]Altaffer cites no authority in support of her additional argument that the amount of the award was unreasonable. We therefore need not consider it. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellant's brief shall contain citations to authority); *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998) (rejecting argument on appeal when no authority provided). But, we note that Altaffer's observation that "[Graves's] counsel spent more than twice as much time on this case as did [her] counsel," and her assertions that the time incurred by Graves's counsel was "excessive and unreasonable" are insufficient as a matter of law. *See Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, ¶¶ 38-39, 167 P.3d 1277, 1285-86 (App. 2007). Once a party has established it is entitled to fees, "the burden shifts to the party opposing the fee award to demonstrate the impropriety or unreasonableness of the requested fees. '[A]n opposing party does not meet [that] burden merely by asserting broad challenges to the application. It is not enough . . . simply to state . . . that the hours claimed are excessive.'" *Id.* ¶ 38 (citation omitted), *quoting State ex rel. Corbin v. Tocco*, 173 Ariz. 587, 594, 845 P.2d 513, 520 (App. 1992).

under [§ 12-341.01]." 143 Ariz. at 570, 694 P.2d at 1184. Altaffer and Graves filed opposing motions with the trial court addressing each of these factors. And, contrary to Altaffer's contention, the court was not required to provide any reasons for its ruling. *See id.* at 571, 694 P.2d at 1185. Rather, we may presume the court considered the opposing arguments and found every fact necessary to sustain its ruling. *See In re CVR 1997 Irrevocable Trust*, 202 Ariz. 174, ¶ 16, 42 P.3d 605, 608 (App. 2002). Because there is thus "a reasonable basis on the record" to support the court's award of fees, we find no abuse of discretion. *See Associated Indem. Corp.*, 143 Ariz. at 571, 694 P.2d at 1185.

Disposition

¶19 For the reasons stated above, we affirm the trial court's judgment and its award of attorney fees. In our discretion, we deny Graves's request for an award of attorney fees on appeal. *See Moedt v. Gen. Motors Corp.*, 204 Ariz. 100, ¶ 23, 60 P.3d 240, 246 (App. 2002).

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge